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IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

RALPH M. CARSON,
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No. 329

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the United States District Court for the Southern District of New York on the motion to strike out the defense of limitations (R. 33-8; R. 338-49) and on

final decree (R. 357-64) are reported respectively in 1 F. Supp. 788, and 20 F. Supp. 930 and 936. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 420-35) is reported in 104 F. (2d) 169.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 29, 1939 (R. 435). The petition for a writ of certiorari was filed on August 29, 1939, and was granted on October 16, 1939, U. S. (R. 437). The jurisdiction of this Court rests upon Judicial Code § 240(a) as amended by the Act of February 13, 1925, 28 United States Code § 347.

The order of this Court granting certiorari limits the review to the question of the application of the New York statute of limitations (R. 437).

Questions Presented

Respondents, creditors of a Federal Joint Stock Land Bank, have brought suit in equity against petitioners, record holders of shares in that Bank, to recover the sum of money representing the double liability imposed upon shareholders of joint stock land banks by 12 United States Code § 812.

The questions are:

1. May a Federal equity court in New York employ the old equity doctrine of laches, contrary to New York law, so as to extend the period of limitation prescribed for the particular case by New York statute?

2. Does the New York three-year statute of limitations, Civil Practice Act § 49, subd. 4, bar respondents' claim?

3. Is the claim asserted by respondents primarily one at law, or primarily equitable, or one of concurrent jurisdiction?

Statutes Involved

12 United States Code § 812 provides:

> "Individual liability of shareholders. Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

New York Civil Practice Act § 49 provides, so far as material:

> "§ 49. Actions to be commenced within three years.
>
> The following actions must be commenced within three years after the cause of action has accrued:
>
> . . . . . .
>
> 4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

New York Civil Practice Act § 195 provides:

"§ 195. Suing for benefit of others.

Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

New York Civil Practice Act § 55 provides:

"§ 55. Action against nonresident.

Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply."

California Code of Civil Procedure § 359 provides:

"§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

Statement of the Case

This is a representative action by J. S. Todd & Co. on behalf of themselves and other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against petitioners, holders of record of certain shares in that Bank (R. 368), pursuant to 12 United States Code § 812. Petitioners were not the beneficial owners of the shares in question. The petitioners Russell, Miller, Steers and Wing, co-partners in the New York brokerage firm of Russell, Miller and Carey, held 200 shares for the account of a customer, to whom they subsequently delivered them (R. 376, 153). The petitioner Pleasants was a pledgee holding 112½ shares as collateral security for a loan (R. 374-6).

The Ohio Joint Stock Land Bank was organized on January 12, 1923, with a capital of $250,000, and had its principal place of business at Cincinnati, Ohio (R. 230, 367). On September 1, 1927, the bank failed to pay interest on its bonds, and in consequence was declared insolvent by the Federal Farm Loan Board (R. 75); its liabilities exceeding its assets by more than $250,000 (R. 371). J. S. Horton was appointed receiver pursuant to the Farm Loan Act (R. 160-1).

The District Court found that the cause of action accrued April 6, 1928 (R. 354) and that plaintiffs herein, and "the creditors and bondholders, on whose behalf plaintiffs sue, had notice of the accrual of said cause of action on or about April 15, 1928" (R. 354). The Circuit Court of Appeals accepted this conclusion as undisputed (R. 423, 104 F. [2d] at 172).

The present action was not commenced until three years and eight months thereafter, *i.e.*, on December 16, 1931 (R. 1).

Decisions of the District Court

(R. 33-8, 1 F. Supp. 788; R. 338-49, 20 F. Supp. 930; R. 357-64, 20 F. Supp. 936.)

Plaintiffs moved before Patterson, D. J., to strike from the answer the defense of the statute of limitations and certain other defenses not here pertinent. The court denied the motion in so far as it related to the statute of limitations, but in so doing, treated that defense as one of laches rather than limitations as an absolute bar. The court held further that under New York law it was the three-year limitation in § 49 subd. 4 of the New York Civil Practice Act, not the six-year limitation in § 48, which applied to suits to collect the statutory liability of stockholders of a Federal joint stock land bank under 12 United States Code § 812 (R. 33-8).

The issue of limitations and laches was tried specially before Knox, D. J. He found that the cause of action accrued and that the creditors had notice thereof on April 6 and 15, 1928, respectively (R. 354, 346). Without discussing petitioners' contention that there was concurrent jurisdiction at law, the court assumed that such concurrent jurisdiction existed (R. 346). Nevertheless the court held that the doctrine of laches, not limitations, was applicable to this action in equity, and that the plaintiffs had not been guilty of laches (R. 353).

On the trial of the main issue, Mandelbaum, D. J., held that defendants were shareholders within the meaning of 12 United States Code § 812, and therefore directed an interlocutory judgment in favor of plaintiffs against all defendants (R. 357-64).

Decision of the Circuit Court of Appeals

(R. 420-35; 104 F. [2d] 169.)

The Circuit Court of Appeals held that petitioners were shareholders within the meaning of 12 United States Code § 812. While admitting that the basis of the action was purely statutory and therefore not strictly equitable, it held that there was no concurrent jurisdiction at law, and therefore refused to apply the statute of limitations (R. 424). The court then ruled that plaintiffs were not guilty of laches, and in so doing largely adopted the language of Knox, D. J. (R. 424-429).

The court declared, however, that if any statute of limitations were applicable, it was the three-year one, saying (R. 423):

> "If, however, the state statute of limitations is a bar, this suit was brought too late. That issue was tried separately before hearing on the merits and it was found that the cause of action accrued in April, 1928. No one now disputes that. The local statute of limitations ran in three years thereafter and this suit was not commenced until about three years and eight months had elapsed."

Clark, Circuit Judge, dissented from the opinion of the majority, holding that the three-year statute barred the action and that, in any event, the plaintiffs were guilty of laches (R. 430-36).

Specification of Errors to be Urged

The Circuit Court of Appeals erred

1. In holding that petitioners were not entitled to the protection of the three-year statute of limitations.

2. In failing to follow the law of the forum, New York, which applies limitations to the exclusion of laches.

3. In failing to hold that the jurisdiction in equity exercised in this case was merely concurrent with jurisdiction at law so as to require the application of limitations.

4. In failing to hold that the nature of the right asserted against petitioners by the plaintiffs was essentially one at law requiring the application of limitations, regardless of the equitable form of the remedy.

I.

Even in a pure equity action in a Federal court in New York to enforce a shareholder's statutory liability, the New York statute of limitations governs to the exclusion of laches.

In this case, more than three years elapsed between the accrual of the cause of action and the commencement of this action, while the New York statute expressly bars actions against a shareholder to enforce his statutory liability after the lapse of three years.[1] The courts below, however, have *extended* this period prescribed by the New York legislature. This they have accomplished by substituting for the New York rule of limitations the ancient equity doctrine of laches and by finding the respondents free of laches.

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[1]Civil Practice Act § 49 subd. 4, quoted at p. 3 above. While the petitioner Russell is a resident of California (R. 365), California Code of Civil Procedure § 339, quoted at p. 4 above, is similar to the New York three-year statute, and is made applicable to this case by another provision of the New York statute, Civil Practice Act § 55, quoted at p. 4 above.

A.

Under New York Law the Three-Year Statute Exclusively Bars Actions of this Character.

As its language shows[2] the New York three-year statute is expressed to apply to all actions against stockholders of a moneyed corporation or a banking association to enforce a liability created by statute. That comprehensive provision embraces the present action to enforce the liability created by 12 United States Code § 812. No distinction is made in the statute between actions in equity and those at law; it is to be applied to all alike.

It was applied[3] by this Court in *Platt* v. *Wilmot*, 193 U. S. 602, in an action at law brought in a Federal court of New York by the receiver of a Colorado bank to enforce a stockholder's liability under the Kansas statute.[4]

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[2]Quoted at p. 3 above.

[3]The statute applied was New York Code of Civil Procedure § 394, the predecessor of Civil Practice Act § 49, subd. 4.

[4]To the same effect are *Ramsden* v. *Gately*, 142 F. 912 (C. C. S. D. N. Y.); *Whitman* v. *Atkinson*, 130 F. 759 (C. C. A. 2); *Hilliker* v. *Hale*, 117 F. 220 (C. C. A. 2); *Platt* v. *Hungerford*, 116 F. 771 (C. C. N. D. N. Y.); *Seattle National Bank* v. *Pratt*, 103 F. 62 (C. C. N. D. N. Y.), affirmed 111 F. 841; *Hobbs* v. *National Bank of Commerce*, 96 F. 396 (C. C. A. 2), rehearing denied 101 F. 75, certiorari denied 178 U. S. 613; *Hillmer* v. *Anderson*, 15 F. Supp. 457 (D. C. W. D. N. Y.)—all applying the New York three-year statute of limitations to actions to enforce stockholders' liability under statutes of other states. These decisions were all rendered in actions at law, as to which it could be argued that the Rules of Decision Act, 28 U. S. C. § 725, R. S. § 721, compelled the application of the local statute of limitations. However, that would be too narrow an interpretation. See *Mason* v. *United States*, 260 U. S. 545, 558-9; see below at pp. 20-2.

The New York Court of Appeals has regularly applied the three-year statute in actions of the character here involved. In *Wright* v. *Russell*, 269 N. Y. 683, it denied leave to appeal from decisions below, 245 A. D. 708 and 155 Misc. 877, which applied the three-year statute to an action in equity by a creditor of an Illinois bank, individually and on behalf of all creditors, to enforce the Illinois statutory liability against a New York stockholder. To the same effect are *Reisman* v. *Hall*, 257 A. D. 892, another action in equity by a creditor of an Illinois bank on behalf of himself individually and all other creditors; and *Nettles* v. *Childs*, 281 N. Y. Mem. Op. 60, Advance Sheets July 1939, affirming 255 A. D. 849. The most recent decision was rendered by the Court of Appeals in *Schram* v. *Cotton*, 281 N. Y. 499, Advance Sheets for December 30, 1939, holding the Comptroller of the Currency barred by the three-year statute in an action to enforce the statutory liability upon stockholders of a holding company for shares of a Michigan national bank.

These cases are decisive with respect to the application of the three-year statute under New York law, and dispose of any contention that New York law would apply the ten-year statute of limitations[5] to such actions. The three-year statute being expressed to govern this particular liability and having been enforced according to its terms by the Court of Appeals in equitable as well as legal actions, this Court need not concern itself with the related but wholly separable controversy in the New York cases as

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[5]New York Civil Practice Act § 53, providing: "Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

to whether claims of different kinds are subject to the six-year statute at law or to the ten-year statute in equity. Respondents contended in opposition to certiorari that the ten-year statute governed this action, citing *Hanover Fire Insurance Co.* v. *Morse Drydock & Repair Co.*, 270 N. Y. 86, and *Rundle* v. *Allison*, 34 N. Y. 80. These cases are wholly foreign to the present question. The first was an action for reformation, the latter an action to enforce a trust; in neither was the three-year statute involved or claimed to be involved; in neither was the statutory liability of shareholders in issue; and the conclusion reached in both was that the ten-year statute, rather than the six-year statute governing strictly legal claims, constituted the appropriate bar, since both were actions of exclusively equitable cognizance. Plainly decisions of this kind can have nothing to do with the application here of a statute, Civil Practice Act § 49, which is expressed and has been held to govern this particular type of case.

The argument for the ten-year statute of limitations has been put more subtly in derivative actions in equity brought by minority stockholders in the right of a corporation against its directors. Here the argument could be and was made that, the action being necessarily in equity, the six-year statute at law was inapplicable and the longer period should govern the asserted liability of corporate directors. In 1937 the Court of Appeals disposed of this contention with a clear and well-considered holding that, regardless of the form of the action, the statute of limitations applicable to the substance of the claim made on behalf of the corporation would govern in each case, that claims for money damages and like claims cognizable at law against defendants would even in a derivative action be barred by six

years, and that only claims necessarily cognizable in equity by reason of an accounting to be made by the defendants for profits received, or the like, would be governed by the ten-year statute. *Potter* v. *Walker*, 276 N. Y. 15. In reaching this conclusion the New York Court followed the reasoning of Lurton, J. in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630.

Even in cases where the defendants in such a derivative action were recipients of bonus payments against whom an accounting for such bonuses was claimed by the plaintiff stockholder, the New York Court subsequently held that the six-year statute applied, inasmuch as the remedy at law sufficed and an accounting was not needed. *Cwerdinski* v. *Bent*, 256 A. D. 612, affirmed by the Court of Appeals without opinion November 14, 1939 (not yet officially reported); *Davis* v. *Cohn*, 256 A. D. 905. In February 1939 the Appellate Division, Second Department, in *Mencher* v. *Richards*, 256 A. D. 280, applied the ten-year statute to a minority stockholder's claim against directors alleged to have personally profited by improper transactions. The corporation involved was a moneyed corporation, and Civil Practice Act § 49, subd. 4, was therefore in terms applicable if the equitable liability of the directors to account fell within the description,

> "a liability created by the common law or by statute."

The liability in equity of the directors to account clearly was not created by statute, as was the liability of the petitioners in the instant case. The Appellate Division, Second Department, held also that it was not a liability created by common law, and refused to apply the three-year limitation.

The case has not been passed upon by the Court of Appeals, leave to appeal having been denied by the Appellate Division, 256 A. D. 1003, and the New York practice not permitting an appeal by leave of the Court of Appeals at that stage of the case. While *Mencher* v. *Richards*, therefore, is not necessarily the law of New York on the point involved, it is clear that it has nothing to do with the application of the three-year statute to the statutory liability asserted in the instant case. It has to do only with the application of the ten-year statute to the liability in equity of corporate directors to account for *profits* which could not be reached by an action at law.

The six-year statute and the ten-year statutes being thus excluded and the three-year statute alone applicable to this case, we may also note that the several limitations prescribed by the New York statute constitute the *only* rules of limitation governing a civil action in New York. Civil Practice Act § 10 provides:

> "The provisions of this article apply and constitute the only rules of limitation applicable to a civil action or special proceeding . . ."[6]

The Court of Appeals has held repeatedly that all actions, whether legal, concurrent or exclusively equitable in character, are within the scope of one or other of the statutes of limitation contained in the Article. *Gilmore* v. *Ham*, 142 N. Y. 1. The Court there said (p. 6):

> "Under the law of this state there is a fixed limitation for every cause of action, whether legal

[6] The exceptions, not here material, are cases where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by written contract, or the action was barred at the time of enactment of the article.

> or equitable. After attaching suitable limitations to numerous classes of actions the Code adds (§ 338): 'An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.'[7] This provision, in the Code of 1848 and continued since, has done away with the old rules as to cases cognizable only in courts of equity, and subjected all alike to some statutory limitation. (*De Pierres* v. *Thorn*, 4 Bosw. 288, 289; *Loder* v. *Hatfield*, 71 N. Y. 104.)"

This Court, in applying the statute of limitations of a State, of course follows the construction given it by the highest court of the State. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63, 73; *Balkam* v. *Woodstock Iron Co.*, 154 U. S. 177, 187-8.

B.

Under New York Law Laches is not a Defense in Actions of this Character.

The relief claimed against the petitioners in this action is claimed in virtue of a Federal statute, because, as is said by the New York Court of Appeals in the latest case holding such a claim barred by the three-year period of limitations,[8]

> ". . . the acts of Congress attached such liability to ownership of the stock regardless of whether or not

[7] This is substantially the same as the present Civil Practice Act § 53, quoted at p. 10 above.

[8] *Schram* v. *Cotton*, 281 N. Y. 499, 505.

> the stockholders were in fact willing or intended to assume that liability . . ."

The relief herein prayed is in no way a matter of discretion or favor.

Now in New York it is clearly established that laches is not a defense against a claim of right, and that the only defense against such a claim by reason of the lapse of time is limitations. This principle was first clearly laid down by the New York court in 1912 in *Pollitz* v. *Wabash R. Co.*, 207 N. Y. 113, which was a minority stockholder's action. In holding the defense of laches insufficient, the Court said (p. 130):

> "Laches, however, is not a bar to the cause of action alleged. The plaintiff, in behalf of the corporation, is seeking to enforce in equity a legal right, to wit, the right of the corporation to recover from the individual defendants the damages resulting from their misuse of its assets. The favor or the discretion of the court is not appealed to, as was the fact in *Groesbeck* v. *Morgan* (206 N. Y. 385) which was an action for specific performance by a vendee against the vendor wherein we held that laches was a defense independent of the statute of limitations. In the present case resort is had to equitable jurisdiction for the purpose of ascertaining through an accounting the sum of damages. . . . The alleged cause of action is barred by the statute of limitations applicable to it, and not by laches. (*Coit* v. *Campbell*, 82 N. Y. 509; *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185.)"

Although the question has not subsequently arisen in the Court of Appeals, the foregoing expression continues to

be recognized as the law by the lower New York courts.[9] The defense of laches now subsists in New York as an equitable defense only, in cases where the favor or discretion of the court is sought, and serves in such cases *further to shorten, but never to extend, the time limited by the statute of limitations.* It is so regarded in *Groesbeck* v. *Morgan*, 206 N. Y. 385, 389; *Calhoun* v. *Millard*, 121 N. Y. 69, 82; *Goldberg* v. *Berry*, 231 A. D. 165, 170; *Coghlan* v. *Coghlan & Shuttleworth Inc.*, 226 A. D. 764.[10] The use of the concept of laches to supplant limitations and thus to *extend* the period in which an action would otherwise be barred by the statute, as was done in this case, is and has been since at least 1848 utterly foreign to the law of New York. Since that year the law of New York has imposed a fixed limitation of time upon every remedy, whether legal or equitable. *Gilmore* v. *Ham*, 142 N. Y. 1, quoted at p. 13 above. The New York courts have re-

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[9] *Schreier* v. *Cummings*, 250 A. D. 808; *Goldberg* v. *Berry*, 231 A. D. 165, 170; *Coghlan* v. *Coghlan & Shuttleworth Inc.*, 226 A. D. 764; *Ulman* v. *Equitable Life Assurance Society*, 161 A. D. 708, 712; *Monroe County Savings Bank* v. *Baker*, 147 Misc. 522, 523; *Parsons* v. *Lipe*, 158 Misc. 32, 73, affirmed 243 A. D. 681, 269 N. Y. 630; *Integrity Trust Company* v. *Posch*, 13 N. Y. Supp. (2d) 973, 976.

[10] In fact many of the decisions of this Court applying the doctrine of laches in equity have done so *within* the period of limitations at law fixed by the legislation of the State. *Patterson* v. *Hewitt*, 195 U. S. 309, 319; *Alsop* v. *Riker*, 155 U. S. 448, 460-1. Others have pointed out that laches will be applied in equity *in the absence* of a prescribed period of limitations. *Godden* v. *Kimmell*, 99 U. S. 201, 211; *Philippi* v. *Philippe*, 115 U. S. 151, 159; *McKnight* v. *Taylor*, 1 How. 161, 168. As is more fully shown below (pp. 22-3), *Kirby* v. *Lake Shore etc. Railroad*, 120 U. S. 130, is the only case in which this Court has purported to apply laches in a manner which would *extend* the period of limitation prescribed by the appropriate State statute.

peatedly insisted upon the strict application of these limitations of time, and have refused to vary them even in cases of hardship. *Schmidt* v. *Merchants Dispatch Co.*, 270 N. Y. 287; *Matter of City of New York*, 239 N. Y. 220, 225; *Erickson* v. *Macy*, 236 N. Y. 412, 415; *Gilmore* v. *Ham*, 142 N. Y. 1; *Engel* v. *Fischer*, 102 N. Y. 400; *Streeter* v. *Graham & Norton Co.*, 263 N. Y. 39.

C.

Under the Rule of the Tompkins and Ruhlin Cases, It Was Error for the Lower Court to Apply Laches to the Exclusion of the Statute of Limitations.

The New York statute of limitations abrogates the remedy without impairing the right. *Lightfoot* v. *Davis*, 198 N. Y. 261, 264. It does not follow, however, that the statute of limitations is a matter of procedure only. Even with respect to a personal debt, the bar of limitations, when perfected, confers a substantial right upon the debtor by the simple but effective device of excluding his creditor from access to the courts; the result is to assure the debtor of a property right, as Holmes, C. J., pointed out in *Dunbar* v. *Boston etc. R. Corp.*, 181 Mass. 383.

Hence the New York statute of limitations, after operating upon a personal debt, becomes an assurance in favor of the debtor's title in quite as real a sense as did the Texas rule of burden of proof as to *bona fide* purchase for value which this Court recently held to be a substantive, not a procedural question. *Cities Service Oil Co.* v. *Dunlap*, October Term 1939, No. 28, decided December 4, 1939. The Fifth Circuit Court of Appeals refused to apply the Texas rule on the subject, pointing out that it was not a

creation of local statute (as is the defense here) and deeming that the question involved only proper practice in courts of equity not controlled by *Erie R. Co.* v. *Tompkins*. But this Court reversed, saying:

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule."

So with a statute of limitations protecting a debtor in respect of his debt. Though it does not affect title to tangible property, it is similarly recognized as conferring a substantial right deserving of protection. *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Guaranty Trust Company* v. *United States*, 304 U. S. 126, 136. The bar of limitations affecting a debt, as is shown in the case last cited (p. 141), goes with the debt upon its assignment and thus in effect cuts down the right assigned.

Laches, in turn, is certainly a matter of substantive law. It affects the right, not merely the remedy. In *Menendez* v. *Holt*, 128 U. S. 514, 523, this Court said of a defense of laches:

> "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself."[11]

In numerous instances this Court has pointed out that laches turns not merely upon lapse of time but also upon the nature and evidence of the plaintiff's rights, all the circum-

[11]To the same effect is *Stuart* v. *Holland*, 179 F. 969, 972 (C. C., Or.).

stances of the case, and the nature and strength of intervening rights and equities. See for example *Galliher* v. *Cadwell*, 145 U. S. 368, 371-2; *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. 685, 697, 698; *Graham* v. *Boston etc. R. Co.*, 118 U. S. 161, 179. Laches imports such a change of situation between the parties that it would be inequitable to afford relief. *O'Brien* v. *Wheelock*, 184 U. S. 450, 493. Such want of equity in a bill is a matter of substance, not of procedure. Hence, a court of equity may refuse relief to the tardy even though the defense was not pleaded nor demurrer made. *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. at 697; *Willard* v. *Wood*, 164 U. S. 502, 524.

To do as did the majority of the Circuit Court of Appeals in this case and apply such a doctrine of substantive law in a forum where it is no longer recognized to govern claims of right, was a plain violation of the rule recently laid down by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and in *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202. In the *Tompkins* case, which overruled the long line of holdings constructed upon *Swift* v. *Tyson*, 16 Pet. 1, this Court said at p. 78:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State . . . There is no federal general common law."[12]

The *Ruhlin* case points out that the doctrine of the *Tompkins* case governs suits in equity also.

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[12]This decision came six years after the basic holding in the District Court characterizing petitioners' defense of limitations as in reality one in laches. The decision of Patterson, D. J., 1 F. Supp. 788, was rendered November 2, 1932.

We conceive that it is a clear violation of the rule now enunciated by this Court with respect to the substantive law to be applied in the Federal courts, to enforce in a Federal court in New York the ancient equity doctrine of laches, which has since 1848 been displaced in the New York law by a complete statutory scheme of limitations. Laches, having no longer a place in the law of New York as a bar to claims of right, should not be employed in the Federal equity practice in New York, in derogation of the New York statute of limitations which precisely applies.[13]

The archaism of the doctrine applied below, as compared with the *Tompkins* and *Ruhlin* principle, becomes the more evident upon an examination of its history. The original statute of limitations in English law, 21 Jac. 1, c. 16 (1623), applied to actions at law only. So did the law of the Colony of New York on the subject, enacted October 24, 1684, 1 Colonial Laws of New York, ch. 16, and the first law of the State of New York on the subject, Laws of New York, 11th Sess. XLIII, Section X (1788). The Rules of Decision Act for the Federal courts, 28 U. S. C. § 725, R. S. § 721 (1789), was expressed to apply to "trials at common law". Federal courts of equity therefore considered themselves without binding statutory direction with respect to the effect of the lapse of time, as is pointed out by Marshall, C. J., in *Elmendorf* v. *Taylor*, 10 Wheat. 152, 168. They followed the statute of limitations by analogy only. Lord Redesdale in *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 629-30

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[13] On the application for certiorari, respondents did not combat this proposition, confining their argument on this phase of the case to contentions (conceived by us to be erroneous) as to what the New York law on the subject is.

(Ireland 1806), said, in language quoted with approval by Marshall, C. J. (10 Wheat. at 173) that courts of equity, while not within the words of statutes of limitation, are within the spirit and meaning of the statutes and act in *obedience* to them in respect of the subject matter for which they were enacted, *i.e.*, "all legal titles and legal demands". The logical consequence of this language was that local statutes of limitation expressed to govern purely equitable proceedings, would be so applied in the Federal courts.

This was no doubt the correct view, and it received discerning support in Federal equity courts with respect to State statutes of limitation expressed to govern equitable as well as legal remedies. Field, Cir. J. in *Hardy* v. *Harbin*, 11 Fed. Cas. No. 6060 at p. 515 (C. C. Cal.), affirmed on other grounds, 154 U. S. 598; Sawyer, J. in *Norris* v. *Haggin*, 28 F. 275, 277 (C. C. Cal.), affirmed on other grounds 136 U. S. 386.[14] Moreover, the restriction of the Rules of Decision Act to trials at common law, did not really have significance with respect to the application of limitations in equity because, as came recently to be pointed out, the

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[14]Sawyer, J. with whom Sabin, J. concurred, said at p. 278:

> "Upon a full consideration of the authorities, the established rule to be deduced from them appears to be that in those states where the statutes of limitations are made applicable to suits in equity as well as to actions at law, where they embrace in terms the specific case, and in case of concurrent jurisdiction, they are, in themselves, as obligatory upon the national courts of equity, as such, as they are upon the state courts, and as they are in actions at law, and the court should act in *obedience*, rather than *upon analogy*, to them . . ."

In affirming this Court relied upon laches, not upon the California statute of limitations.

Rules of Decision Act is merely declaratory of the rule which would exist in the absence of the statute. *Mason* v. *United States*, 260 U. S. 545, 559 (1923).

However, as laches came to be developed as a substantive doctrine of equity jurisprudence it was more and more employed in the lower Federal courts to release the equity courts from obedience to the statute of limitations. Frequent expressions, although not actual decisions, may be found in opinions of this Court to the effect that equity will act in obedience to the statute of limitations only where its jurisdiction is concurrent with that at law; *i.e.*, where the claim or demand dealt with in equity was a legal claim or demand for which the Legislature had provided a period of limitations. For example, *Badger* v. *Badger*, 2 Wall. 87, 94; *Bank of United States* v. *Daniel*, 12 Pet. 32, 56; *Wagner* v. *Baird*, 7 How. 234, 258. The doctrine in the lower courts came to be, as expressed by the Circuit Court of Appeals in this case, 104 F. (2d) at 172 (R. 424), that Federal equity suits were not barred absolutely by limitations but were subject only to being dismissed for laches where by reference to some analogous limitation statute they were stale and no good excuse for the delay was shown. This doctrine was predicated on *Benedict* v. *City of New York*, 250 U. S. 321, and on *Kirby* v. *Lake Shore etc. Railroad*, 120 U. S. 130.[15] In point of fact, however, the *Kirby* case alone stands for that proposition in this Court. The *Benedict* case, while citing the *Kirby* case for that proposition, did consider the New York statute of limitations to bar an action to enforce an express trust.

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[15] Both cited by Patterson, D. J., in the instant case in the District Court, 1 F. Supp. 788, 789.

It is believed that in no case other than *Kirby* v. *Lake Shore etc. Railroad* has the doctrine been actually applied by this Court that equity is not bound by the State statute of limitations. Even there the doctrine was so applied as to give the defendants the benefit of the State statute.

Reference to the *Kirby* case will show the similarity to the rule of *Swift* v. *Tyson*, 16 Pet. 1, of the doctrine there stated and that applied in this case. The *Kirby* case was an action in the Circuit Court for the Southern District of New York for an accounting. The lower court held the suit barred by the New York statute of limitations. The question was whether the action was one brought on the ground of fraud within the meaning of the New York statute, which in such case postponed accrual until discovery by the plaintiff of the facts constituting the fraud. This Court disregarded the New York statute and its construction by the New York Court of Appeals on the ground that Federal jurisdiction in equity cannot be impaired by the local statutes of the different States (p. 137), that the Federal equity jurisdiction is subject to neither limitation nor restraint by State legislation (p. 138, quoting *Payne* v. *Hook*, 7 Wall. 425, 430), and that upon any other theory the Federal equity jurisdiction could not be exercised according to rules and principles applicable alike in every State (p. 138).

This is the same invocation of a general Federal law in the equity courts which, as claimed for the Federal courts of law in *Swift* v. *Tyson*, has been repudiated by the *Tompkins* and *Ruhlin* decisions. The doctrine of laches relied upon below is based upon the theory of a general Federal equity jurisprudence, and must fall with it.

II.

Independently of the New York rule, existing federal precedents required the application to this case of limitations, rather than laches, by reason of the concurrent jurisdiction of law and equity.

It was conceded by the Circuit Court of Appeals (R. 423, 104 F. [2d] at 172), and will doubtless be conceded by the respondents here, that the New York statute of limitations would bar this action to the exclusion of laches if the jurisdiction of law and equity in this case is concurrent. There can be no dispute as to this principle. *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 448; *Baker* v. *Cummings*, 169 U. S. 189, 206; *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 505.

Respondents convinced the courts below that this action is one of exclusively equitable cognizance by reason of its representative character and the need for an accounting *among the creditors.* In our submission respondents are wrong in this contention. If so, the decree below should be reversed whether or not the rule of *Erie R. Co.* v. *Tompkins* requires strict application of the New York law.

A.

Respondents' Claim Herein Is Primarily a Claim at Law.

Jurisdiction herein lies primarily at law by virtue of the fact that money is the measure of the liability imposed upon petitioners by the statute, 12 United States Code

§ 812. It is true that the statute imposes liability upon the shareholders "equally and ratably, and not one for another." While in some cases this language might be deemed to require an accounting among all the shareholders in order to assure the proportionate payment of his liability by each, any such possibility is excluded in the instant case by the fact that the assessment required here is 100%; the deficiency in assets of the Ohio Joint Stock Land Bank was $497,411.29 as against outstanding common stock of $250,000, indicating a minimum and maximum shareholders' statutory liability of that amount (R. 370, 367). Hence, in fact and as a matter of substance, no accounting among the defendant shareholders was or would ever be necessary, because each was liable in full.[16] This was the view of the dissenting judge (R. 432; 104 F.[2d] at 176).

The liability of petitioners as shareholders being thus determinable in a fixed sum of money, an action to recover this liability clearly lay at law. It is so held, for example, in *Weeks* v. *Love*, 50 N. Y. 568, 570; *Van Hook* v. *Whitlock*, 3 Paige Ch. 409, 416, 417.

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[16]Respondents have always contended that their *knowledge* with respect to the relative assets and liabilities of the Ohio Joint Stock Land Bank at the inception of this suit, was what determined the propriety and necessity of an accounting. The only finding on the point is that at the inception of the suit respondents did not know that the deficiency "would be more than $250,000" (R. 370). This is not a finding that they knew or believed it would be less than $250,000, although only such a finding would justify the assumption that an accounting would be needed. But in any event we submit that the state of the plaintiffs' knowledge at the inception of the suit, whether complete or incomplete, cannot possibly be *employed to eliminate defenses* open to the petitioners upon the true facts.

Under New York Civil Practice Act § 195,[17] which at the inception of this action was available to the plaintiffs under the Conformity Act, 28 United States Code § 724, the plaintiffs could have stated a representative claim at law in the District Court for the benefit of all the creditors, without resort to equity. That § 195 authorizes a representative suit at law, see *McKenzie* v. *L'Amoureux*, 11 Barb. 516; *Kirk* v. *Young*, 2 Abb. Pr. 453; *Cherry* v. *Howell*, 4 F. Supp. 597, 599, affirmed 66 F. (2d) 713 (C. C. A. 2, 1933). Instances of suits at law under a similar provision in the codes of other States are *Branson* v. *Industrial Workers of the World*, 30 Nev. 270, 290; *Platt* v. *Colvin*, 50 Ohio St. 703, 711-2; *Florence* v. *Helms*, 136 Cal. 613; *Hodges* v. *Nalty*, 104 Wis. 464; *Colt* v. *Hicks*, 97 Ind. App. 177, 191-2; Pomeroy, Code Remedies (5th ed. 1929), p. 441.

Indeed it is conceded that, if an action at law could have been stated by a representative of the creditors against the shareholders for their statutory liability, that action would have been barred by the statute of limitations at law, in this instance the three-year statute. *Curtis* v. *Connly*, 257 U. S. 260 (action by equity receiver against directors barred by six-year Rhode Island statute); *McClaine* v. *Rankin*, 197 U. S. 154 (action by receiver of national bank to recover shareholders' statutory liability barred by Washington two-year statute); *Platt* v. *Wilmot*, 193 U. S. 602 (action by receiver of Colorado national bank to recover shareholder's liability imposed by Kansas law held barred by New York three-year statute).

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[17]Quoted at p. 4 above.

The only reason adduced by the respondents for maintaining the exclusive jurisdiction of equity for this case is that it has been held that the receiver of a joint stock land bank cannot himself sue to enforce the shareholders' statutory liability. *Wheeler* v. *Greene*, 280 U. S. 49. In that case, pointing out the difference between the Farm Loan Act and the National Bank Act, Holmes, J. said that the words "equally and ratably" in the Farm Loan Act implied a bill in equity as the "usual proceeding" for adjusting the assessment to the specific case and as "the most likely way of reaching that result." Referring to this opinion, this Court said in *Christopher* v. *Brusselback*, 302 U. S. 500, 502, that it left an adversary suit in equity against the stockholders as "the only means of enforcing the liability left to creditors of the joint stock land bank." Comparison with the language of Holmes, J. will show that the phrase "the only means" is not a strictly accurate paraphrase of his expression "the most likely way". Further, it is clear from both opinions that in neither instance did this Court mean to characterize the equitable remedy to enforce shareholders' liability as a matter of substance, it being clearly a matter of form.

The strictly legal character of the money indemnity herein claimed against the petitioners is a matter of substance, not affected by the equitable form in which the proceeding was cast in the absence of a receiver or other representative of the Ohio Joint Stock Land Bank competent to speak for all creditors. The reality of this distinction, and its significance as affecting the statute of limitations, are pointed out in the opinion of Mr. Justice Lurton in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, 648, 649, quoted

and followed by the New York Court in *Potter* v. *Walker*, 276 N. Y. 15, 26. The essence of Mr. Justice Lurton's analysis is that the equitable form imposed upon a proceeding against corporate directors through the assertion by a minority stockholder of the right of the corporation derivatively, does not affect the substance of the corporate claim so asserted, for the purpose of the statute of limitations; and that the statute of limitations at law will still be applied in the derivative action if it would have governed the claim by the corporation itself. This distinction between form and substance is a matter of general law. *Spencer* v. *Anderson*, 193 Cal. 1; *Brick* v. *Cohn-Hall-Marx Co.*, 276 N. Y. 259; *Hale* v. *Coffin*, 120 F. 470, 473 (C. C. A. 1). Lurton, J. in *Hughes* v. *Brown*, 88 Tenn. 578, pointed out that the application of the statute of limitations in equity was determined by the *cause of action*, rather than by the nature of the equitable relief sought. The substance of a creditor's claim on account of the statutory liability of a bank stockholder is one at common law. *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 225; *Platt* v. *Wilmot*, 193 U. S. 602, 613; *McDonald* v. *Thompson*, 184 U. S. 71, 74. It is the counterpart of the common law liability of partners to creditors. *Lang* v. *Lutz*, 180 N. Y. 254, 258.

This being so, the fact that the moneys recovered by the plaintiff creditors from the defendant shareholders must be applied by the Court equally to the claims of all creditors, does not affect the legal nature of the claim *as against the defendants*, any more than the legal character of a claim against corporate directors is affected by the derivative nature of the minority stockholder's action or the Court's control over the proceeds.

B.

The Jurisdiction of Equity Herein Is at Most Concurrent and Does Not Affect the Operation of the Statute of Limitations at Law.

In *Curtis* v. *Connly*, 257 U. S. 260, where this Court applied the Rhode Island statute of limitations at law to an equity receiver's action against corporate directors for mismanagement, the appellant unsuccessfully argued that a State statute of limitations "does not have the force of a statute as a bar in the Federal courts."[18] In *McDonald* v. *Thompson*, 184 U. S. 71, this Court applied the Nebraska statute of limitations to a bill in equity by the receiver of a Nebraska national bank to recover a stockholder's proportion of an assessment; the statute was expressed in terms sufficient to bar the action, and no discussion of laches appears in the opinion of this Court. In *Morgan* v. *Hamlet*, 113 U. S. 449, this Court applied the Arkansas two-year statute to a bill in equity by administrators *de bonis non* for an accounting against the estate of a partner of the deceased; the statute in terms governed claims against estates of deceased persons, and no consideration of laches appears in the opinion.

These and like cases are sought to be distinguished by respondents on the ground that the instant case is necessarily brought by creditors for the benefit of the class, not by a statutory or other representative. The invalidity of any such distinction has, we believe, been demonstrated. But in any event this Court has applied the statute of limi-

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[18]Appellant's brief p. 24, citing *Benedict* v. *City of New York*, 250 U. S. 321.

tations at law to equitable actions in form indistinguishable from the present. In *Pollard* v. *Bailey*, 20 Wall. 520, and *Terry* v. *Little*, 101 U. S. 216, this Court held that the statutory liability of bank stockholders could be enforced at the suit of a creditor only in equity and that an action at law therefore was demurrable.[19] Suits in equity by bank creditors to enforce the statutory liability of stockholders were, under this rule, as purely of equitable cognizance and as much entitled to the benefit of laches, as the instant case can be claimed to be. Nevertheless this Court has twice held such bills in equity to be barred by limitations, not by laches. *Godfrey* v. *Terry*, 97 U. S. 171; *Carrol* v. *Green*, 92 U. S. 509.

Godfrey v. *Terry* was a bill in equity filed in the United States Circuit Court for the District of South Carolina by a creditor of a South Carolina bank to enforce the statutory liability of defendant stockholders. At page 180 this Court said:

> "We are further of opinion that as to those who were then stockholders the Statute of Limitation is a perfect bar, and no action can be maintained against them."

So in *Carrol* v. *Green* this Court applied the South Carolina statute of limitations to a bill in equity by creditors to enforce the statutory liability of stockholders of a South Carolina bank. The remedy was essentially equitable, as this Court clearly pointed out at page 512 holding that debt

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[19]These holdings based upon particular charters or statutes are to be distinguished from the facility given the present respondents to sue at law under New York Civil Practice Act § 195 and the Conformity Act; see at p. 26 above.

could not have been maintained against the stockholders. Moreover the South Carolina statute of limitations did not, like New York Civil Practice Act § 49, apply expressly to actions to enforce the statutory liability of stockholders of moneyed corporations, but was a general statute governing actions upon the case and for debt. Nevertheless this Court thought that the applicability of the statute of limitations to the equitable action was too clear for discussion. 92 U. S. at 516:

> "If a claim like that of the appellees sued at law would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it."

Whether these two cases were decided on the ground that a bill in equity like that here involved invokes an equity jurisdiction concurrent with that at law, or on the ground that the statute of limitations will be applied to bar equitable actions in the Federal courts, they would seem to be alike decisive in their application to the instant case. In other cases too, without elaboration of reasons, this Court has applied the statute of limitations to equitable actions. In *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 505, 506, an action for breach of trust was held to be barred by the New York statute of limitations. So in *Bacon* v. *Howard*, 20 How. 22, 26, this Court held that a bill in equity to enforce a judgment obtained against the defendant by complainants' assignor, now dissolved, was barred by the Texas statute of limitations. In *Boone County* v. *Burlington etc. R. Co.*, 139 U. S. 684, 692, and *Pearsall* v. *Smith*, 149 U. S. 231, 237, this Court held purely equitable actions to be barred both by laches and by the State statute of limita-

tions. In *Wilson* v. *Koontz*, 7 Cranch 202, 205-6, Marshall, C. J. sustained the defense of limitations against a suit in chancery brought to enforce a debt recoverable at law.

Conclusion

The decision below is not warranted by the New York law of limitations, made applicable herein under the rule of *Erie R. Co.* v. *Tompkins*, and is also incorrect as a matter of general law. The decree should be reversed and the complaint dismissed.

Respectfully submitted,

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(1989)